NAZORI BIN TEH & ANOR.

v.

TAY LYE SENG & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J
[CIVIL SUIT NO. 23-173 OF 1993]
5 AUGUST 1995

TORT: *Road accident - Personal injury - Quantum of damages - Whether full time nursing care required - Whether plaintiff entitled to compensation for nursing care - Loss of earnings - Whether recoverable - Plaintiff no work permit at material time - Whether maxim ex turpi causa non oritur actio applicable in tort.*

This was a running down case in which liability was agreed by the parties on a 50:50 basis. General and special damages were also agreed and the only issues before the Court were whether nursing care and loss of earnings were recoverable.

The 1st plaintiff (PW1) who claimed RM400 per month as nursing care testified that after the accident he could move and put on his shirt albeit with difficulty. However, he could not bathe, urinate or move his bowel or use the staircase of the house without assistance. This was supported by the evidence of his brother (PW2) and the medical specialist who stated that such assistance would have to be provided permanently.

The defendants disputed the claim for loss of earnings on the ground that PW1 was working in Singapore at the material time without a work permit and hence the earnings were illegal. PW3, PW1's brother who worked for the same company, stated that PW1 had a work permit 3 to 4 months prior to the accident and PW1's employer, whose duty it was to obtain the work permit, had tried to get it but the employee was first required to undergo a medical examination. This evidence was unrebutted by the defence.

Held:

[1] The 1st plaintiff is entitled to claim compensation for the value of nursing care services rendered to him. Granted that assistance would have to be provided permanently to him in respect of certain services but his condition was not reduced to a 'vegetable state' which required full time nursing care. Accordingly a sum of RM200 per month would be reasonable to look after the needs of the 1st plaintiff as and when required.

[2] The defence failed to show that the 1st plaintiff was unlikely to get a work permit. In the circumstances, the Court is of the view that the illegality was capable of being legitimised. On the basis that the maxim *ex turpi causa non oritur actio* has a limited application in tort, the fact that the 1st plaintiff was involved in some wrongdoing through no fault of his does not itself provide the defendant with a good defence in tort. It cannot be said that the 1st defendant was knowingly breaking the law as he was given the expectation by his employer that a work permit would be obtained by him. Therefore the defendants fail on this issue.

[3] From the evidence of PW3, the 1st plaintiff earned about S$700 per month. After deducting his living expenses a sum of S$547 is left. The Court would therefore award a sum of S$105,024 as loss of earnings based on 16 years purchase as agreed by the parties.

[Claim allowed as ordered with costs to be taxed, unless agreed].

Cases referred to:

Ahmad Daman Huri bin Hussein v. Koo Chin Yau [1990] 3 MLJ 53 ***(refd)***

Cunningham v. Harrison [1973] 3 WLR 97 ***(refd)***

Chandra Sekaran a/l Krishnan Nair & Anor. v. Ayub bin Mohamed & Anor. (Johor Bahru Civil Suit No. 22-299-1990) ***(refd)***

Chua Kim Suan & Teo Teik Nam (suing as Administratrix and Administrator respectively of the Estate of Teoh Tek Lee, deceased) v. Government of Malaysia & Anor [1994] 1 AMR 89 ***(dist)***

Yaakob Foong v. Lai Mun Keong & Ors. [1986] 2 MLJ 317 ***(dist)***

Zakaria bin Putra Ali v. Low Keng Huat Construction Co. (S) Ltd. & Ors. [1994] MMD (Mar. 94) 432 ***(foll)***

Ooi Han Sun & Anor. v. Bee Hua May [1991] 3 MLJ 219 ***(cit)***

For the plaintiff - J. Chandrika - M/s. John Ang & Jega
For the defendants - S.C. Wong; M/s. Arthur Lee & Co.

JUDGMENT

Haidar bin Mohd Noor J:

In this running down case, liability was agreed by the parties on 50% - 50% basis.

The following damages were agreed also by the parties:

(1) *In respect of first plaintiff*

General damages for pain and suffering	RM 70,000.00
Special damages	RM 1,500.00
	RM 71,500.00

(2) *In respect of second plaintiff*

General and special damages -	RM 13,000.00

The issues left for the determination of the Court are in respect of first plaintiff only. They are:

(1) Nursing care

(2) Loss of earnings.

Evidence was adduced in respect of the two issues.

(1) *Nursing care*

Under this category the first plaintiff is entitled to claim for compensation for the value of the services rendered to him. (See *Ahmad Daman Huri bin Hussein v. Koo Chin Yau* [1990] 3 MLJ 53; *Cunningham v. Harrison* [1973] 3 WLR 97).

The first plaintiff (PW1) gave evidence that after the accident he could move and put on his shirt with the help of the left hand though with great difficulties. Even that also he could raise his left hand slightly and he demonstrated this to the Court. However, he could not bathe or urinate or move his bowel as much as he could not use the staircase of the house without assistance. His brother (PW2) supported his evidence. According to Dr. A. Ramachandran, the Consultant Orthopaedic Surgeon at page 17 of his report, such assistance would have to be provided to him permanently. Granted that assistance would have to be provided permanently to him in respect of certain services but then it could

not be said that his condition was reduced to a 'vegetable state' thereby requiring full nursing care for him. In the circumstances I am of the opinion that a full time nursing care is not required for him.

The first plaintiff claimed a sum of RM400 per month as nursing care and I think this is on the basis of a full time nursing care. Be that as it may is a sum of RM400 for full time nursing care in Terengganu, say compared to Johor Bahru or Kuala Lumpur, reasonable in the circumstances as no evidence was led in respect of this claim. I am of the view that a sum of RM300 per month would be reasonable in the circumstances as he is staying in a village in Terengganu. However, as evidence shows that full time nursing care is not really required, I would think that a sum of RM200 per month would be reasonable to look after the needs of the first plaintiff as and when required as otherwise he should be able to move around and do other things, as I said earlier, though with some difficulties.

As the multiplicand is not seriously disputed by the Counsel for the defendants and following the unreported case of *Chandra Sekaran a/l Krishnan Nair & Anor. v. Ayub bin Mohamed & Anor.* (Johor Bahru Civil Suit No. 22-299-1990) I would adopt the common law approach and would award as follows:

(i) Pre trial nursing care -

40 months x RM200.00 RM8,000.00

(April 1992 to July 1995)

(ii) Post trial nursing care -

65 years - 23 years = 42 years.

Giving 1/3 for contingency thereby leaving

28 years x 12 months = 336 months x RM200.00 RM67,200.00

(65 years life span of a male is not disputed by the defence).

Therefore, based on 50% liability, the sum should be

$$\frac{\text{RM8,000.00} + \text{RM67,200.00}}{2} = \text{RM37,600.00}$$

(2) *Loss of earnings*

The multiplier used by the first plaintiff's Counsel was agreed to by the Counsel for the defendants. However, the defendants disputed the claim for loss of earnings on the ground that the first plaintiff at the material time worked in Singapore without a work permit and hence the earnings were illegal and cited the case of *Chua Kim Suan & Teo Teik Nam (suing as Administratrix and Administrator respectively of the Estate of Teoh Tek Lee, deceased) v. Government of Malaysia & Anor.* [1994] 1 AMR 89 where at page 97, the Supreme Court stated:

> We have decided after most anxious consideration that any claim for loss of earnings from any illegal source should not be allowed on the ground that it is against public policy. We think that we should also follow, on this point, the decisions of *Ooi Han Sun; Burns; Lebagge and Dhlamini, supra* and approve the dictum in question in *Yaakob.*

While it is true that the maxim *ex turpi causa non oritur actio* is applicable in the circumstances of *Chua Kim Suan's* case, the facts in this case, are somewhat slightly

different and can be distinguished. In *Chua Kim Suan's* case there was a blatant disregard to the conditions of the permit imposed by the licensing authority and in *Yaakob Foong v. Lai Mun Keong & Ors.* [1986] 2 MLJ 317, the plaintiff had no work permit at all. In this case the first plaintiff's brother (PW3) under cross-examination said that 3 to 4 months before the accident PW1 had a work permit. According to PW3, it was the duty of the employer of PW1 (also the employer of PW3) to get the work permit for PW1. According to PW3 the employer tried to get the work permit but the employee will have to undergo medical examination first. PW1's employer had ceased operations and therefore could not be called to give evidence. This aspect of the evidence was not challenged by the defence.

The Counsel for the first plaintiff brought to the attention of the Court the Singapore case of *Zakaria bin Putra Ali v. Low Keng Huat Construction Co. (S) Ltd. & Ors.* [1994] MMD (Mar. 94) 432. One of the issues considered by the Singapore High Court was in respect of work permit, an issue similar to the issue before this Court. However, as the reported decision at page 91 of the Bundle of Authorities are not comprehensive I asked Counsel for the first plaintiff to provide me with a copy of the full judgment so as to understand and appreciate the rationale of the judgment in relation to the work permit issue. Subsequently, I was given a copy of the full judgment of the said case.

The brief facts of the said case are:

The plaintiff is a Malaysian and had gone to work in Singapore at the second defendant's request. The second defendants are sub-contractors engaged by the first defendants who are the main contractors in the building project. The plaintiff was a bartender and casual labourer. His job was to assemble steel rods and tie them together. On his second morning at the worksite, he crawled into a cage of steel rods to do his work. While he was working, the structure collapsed on him and he suffered severe injuries. His claim is for both breach of statutory duty and negligence. The learned Judge, *inter alia*, rejected the first defendant's submission that the failure of the plaintiff and the first defendant to produce a work permit denies the plaintiff his statutory right.

At page 30 of the judgment, the learned Judge citing *Ooi Han Sun & Anor. v. Bee Hua May* [1991] 3 MLJ 219, another Singapore High Court case where no work permit was issued, succinctly summarised the principles in *Ooi Han Sun's* case as follows:

(i) that the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) will apply in law of contract to prevent a plaintiff founding a claim on an illegal act or agreement;

(ii) that the maxim has a limited application in tort and the fact that the plaintiff is involved in some wrongdoing does not of itself provide the defendant with a good defence in tort;

(iii) the effect of illegality on quantum of damages is not to make compensation hopeless;

(iv) that notwithstanding illegality damages would be awarded but there would be a discount for the *ex turpa causa*.

(v) that consideration should be given to cases where illegality was capable of being legitimized; and

(vi) that the burden of proof of illegality was capable of being legitimized was on the plaintiff.

In this case, the first plaintiff had adduced evidence through PW3 that it was his employer's duty to get a work permit and his employer would try to get a work permit but before that he should undergo a medical examination. Previously he had a work permit but apparently expired 3 to 4 months prior to the accident. The defence had not shown that the first plaintiff is unlikely to get a work permit. It is not disputed that work permit had been obtained for him in the past. He was told that a work permit would be obtained.

In the circumstances I am of the view that the illegality was capable of being legitimized and this was shown by the first plaintiff. On the basis that the maxim *ex turpi causa non oritur actio* has a limited application in tort, therefore the fact that the first plaintiff was involved in some wrongdoing through no fault of his does not of itself provide the defendant with a good defence in tort. It cannot be said on the given facts that the first plaintiff was knowingly breaking the law as he was given the expectation by his employer that a work permit would be obtained for him. I would accordingly rule that the defendants failed on this issue.

I now have to consider his claim for loss of earnings.

His brother, PW3 said that PW1 earned between 28 and 30 Singapore Dollars per day for between 24 and 25 days in a month. PW1 normally goes to work in Singapore in PW3's motor cycle and paid PW3 between RM50 and RM60 per month for transportation. PW1 was paid fortnightly by his employer. The defence did not question on this evidence of the earnings of PW1. In the circumstances I would put his earnings at 29 Singapore Dollars per day for 25 days a month which comes to 725 Singapore Dollars per month, say 700 Singapore Dollars. Besides his contribution of RM60 per month for transportation to Singapore from Johor Bahru, PW1 would certainly incur expenses for lunch in Singapore. No doubt no evidence was led in this respect, but I would allow an expense of 5 Singapore Dollars per day, which works out to 5 x 25 = 125 Singapore Dollars. I take RM60 as equivalent to 28 Singapore Dollars, the deduction for living expenses would come to 153 Singapore Dollars, leaving a sum of 547 Singapore Dollars per month.

As the multiplier used by the Counsel for the plaintiff was agreed by the Counsel for the defendants, I would award loss of earnings in Singapore Dollars as follows:

(i) Loss of past earnings 1 January 1992 to 21 July 1995:	
43 months x 547	23,521
(ii) Loss of future earnings 192 months - 43 months =	
149 months x 547	81,503
(Based on 16 years purchase)	
	105,024

This award is based on 100% liability.

There will be no interest for this sum. There would however be interest of 8% per annum for the global sum from date of judgment to realisation. Costs of the suit to the plaintiffs to be taxed, unless agreed.